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12

13 UNITED STATES DISTRICT COURT  
14 CENTRAL DISTRICT OF CALIFORNIA  
15

16 JORGE A. MEJIA, an individual,  
17 appearing on behalf of himself and all  
others similarly situated,

18 Plaintiff,

19 v.

20 DHL EXPRESS (USA), INC., an Ohio  
21 corporation; and DOES 1-25,

22 Defendants.  
23  
24  
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26  
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Case No. 2:15-cv-0890 GHK-JC

**DEFENDANT'S OBJECTIONS TO  
AND MOTION TO STRIKE  
PLAINTIFF'S NEW EVIDENCE AND  
ARGUMENTS IN SUPPORT OF  
PLAINTIFF'S REPLY  
MEMORANDUM IN SUPPORT OF  
MOTION FOR CLASS  
CERTIFICATION**

## 1 **I. INTRODUCTION**

2 Defendant DHL Express (USA), Inc. (“DHL”) objects to and moves to strike three  
 3 new declarations, including exhibits, improperly filed by Plaintiff Jorge Mejia with his  
 4 reply brief in support of his motion for class certification (“Reply”).<sup>1</sup> Plaintiff attempts to  
 5 put before this Court for the first time three supplemental declarations, attaching nine  
 6 new exhibits. Not only does Plaintiff belatedly submit this new purported evidence, he  
 7 also relies on this improperly submitted evidence to make new arguments never before  
 8 made in his certification papers. There is simply no basis for Plaintiff’s untimely  
 9 submissions -- all of the evidence now submitted for the first time on reply was available  
 10 to Plaintiff at the time he filed his opening brief. Simply because Plaintiff now realizes  
 11 that his original moving papers are deficient, as DHL pointed out in its Opposition  
 12 papers, that does not provide Plaintiff with a basis for filing additional alleged support for  
 13 his motion. DHL should not be prejudiced by Plaintiff’s failure to submit evidence and  
 14 articulate legal theories in a timely manner. DHL therefore respectfully requests that the  
 15 Court disregard Plaintiff’s new alleged evidence and arguments submitted for the first  
 16 time in its Reply.

## 17 **II. THE COURT SHOULD STRIKE NEW EVIDENCE AND FACTS** 18 **OFFERED FOR THE FIRST TIME ON REPLY**

19 It is well established that it is improper for a moving party to introduce new  
 20 evidence on reply. *See Lujan v. National Wildlife Federation*, 497 US 871, 894–895  
 21 (1990); *see also Fleischer Studios, Inc. v. A.V.E.L.A., Inc.*, 654 F.3d 958, 966 (9th Cir.  
 22 2011). Both the Federal Rules of Civil Procedure and the Central District of California’s  
 23 Local Rules prohibit the untimely introduction of new evidence on reply. “The Central  
 24 District of California’s Local Rule 7–5, titled ‘Moving Papers,’ states that ‘[t]here shall  
 25 be served and filed with the notice of motion: ... (b) The evidence upon which the moving  
 26 party will rely in support of the motion.’ **“By submitting its evidence with its**

27 <sup>1</sup> These three declarations are the Supplemental Declaration of Gregg A. Farley (Docket # 49-2); the  
 28 Supplemental Declaration of Peter Banos (Docket # 49-3); and the Supplemental Declaration of Plaintiff  
 Jorge Mejia (Docket # 49-4), along with attached exhibits.

1 **supplemental brief, as opposed to with its original motion for summary judgment,**  
 2 **and by failing to file a motion to show cause why its neglect was excusable, [the**  
 3 **moving party] failed to comply with Local Rule 7–5 and Federal Rule of Civil**  
 4 **Procedure 6(b).”** *Id.* at 966 (emphasis added)(affirming that district court properly  
 5 refused to consider new evidence introduced on reply).

6 Here, Plaintiff has belatedly submitted three separate supplemental declarations,  
 7 including nine new exhibits, in support of his Reply and has made no effort, which he  
 8 cannot in any event do, to show “excusable neglect” for the submission of his tardy  
 9 evidence:

10 Supplemental Declaration of Jorge Mejia:<sup>2</sup> Plaintiff submits a supplemental  
 11 declaration to support his adequacy as a class representative. In connection with his  
 12 improper retention of an overpayment of wages, Plaintiff responds to DHL’s opposition  
 13 with new claims that he never realized that DHL paid him his final wages twice, even  
 14 though this duplicate payment was made several weeks after his termination. Plaintiff  
 15 apparently expects the Court to believe that he just overlooked the deposit of an  
 16 additional \$717 after his termination. That does not pass the risibility test.

17 Further, Plaintiff weakly asserts that, when he falsified an injury report to cover up  
 18 the fact that he was injured because he failed to follow proper procedure in securing a  
 19 load he was transporting, he did this because he “did not have much room to provide an  
 20 explanation for the accident.” Of course, this ignores the fact that the explanation he  
 21 gave *was completely different than what actually happened*. Mejia would have us believe  
 22 that “not hav[ing] much room to provide an explanation” led him to describe his injury as  
 23 resulting from falling off his tug, rather than an injury incurred while attempting to  
 24 prevent an improperly-secured load from slipping off a trailer. By submitting this utterly

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25 <sup>2</sup> Mejia’s declaration is also striking for what it does *not* include. Despite the fact that DHL pointed out  
 26 that Mejia has never asserted that he ever performed work when he clocked in during a pre-shift “grace  
 27 period,” Mejia’s supplemental declaration *still* does not include such an assertion. The inescapable  
 28 conclusion is that *Mejia never worked any uncompensated time prior to starting his paid shift*. Mejia  
 therefore cannot serve as a class representative on this claim, as he is not a member of the very class he  
 seeks to certify.

1 disingenuous explanation in a declaration, Mejia has even further damaged his credibility  
2 and underscored his inadequacy as a class representative.

3 Of course, adequacy as a representative is one of the standards for certification set  
4 forth in Rule 23, so this issue should have been fully briefed in the moving papers, along  
5 with all supporting evidence. Plaintiff's counsel admits in his supplemental declaration  
6 that he was aware that DHL had raised questions regarding the propriety of Plaintiff  
7 keeping the double payment,<sup>3</sup> and of course Plaintiff and his counsel knew that Plaintiff  
8 had been fired for failing to properly secure his load and then lying about his resulting  
9 injury.<sup>4</sup> Thus, no excuse exists for failing to include these facts and argument in the  
10 moving papers.

11 Supplemental Declaration of Peter Banos:

12 Mr. Banos' supplemental declaration focuses on three issues. First, Banos declares  
13 that he has reviewed the timekeeping data produced by DHL and confirmed that the pre-  
14 shift "grace period" applied to both union and non-union employees. This "finding" is  
15 entirely irrelevant, as DHL pointed out in its Opposition that this was the case. As Mr.  
16 Fernandez stated in his declaration, the "grace period" policy is a union "past practice"  
17 that is still followed as part of "the law of the shop" at DHL, but it has been afforded to  
18 non-union employees as well out of convenience.<sup>5</sup>

19 Next, Banos spends several paragraphs of his supplemental declaration evaluating  
20 the statements in two of DHL's declarations that certain DHL locations do not currently  
21 utilize any "grace period" or "rounding." Banos concludes that he "cannot confirm"  
22 these statements, rendering the several pages of discussion on this issue irrelevant and  
23 pointless.

24 Finally, Banos includes a paragraph concerning his conclusion that the \$717  
25 overpayment made to Mejia was less than the amount that Banos estimates Mejia was  
26 allegedly underpaid due to the "grace period" policy. However, once again this is

27 <sup>3</sup> Supplemental Farley Decl. ¶¶ 5-9.

28 <sup>4</sup> See Supplemental Mejia Decl. ¶¶ 3-6.

<sup>5</sup> Docket # 45-4 at ¶8.

1 entirely irrelevant; as Mejia *does not even contend he himself ever worked when clocked*  
 2 *in before his shift*, it makes no sense to calculate “unpaid wages” where no wages are due  
 3 in the first place.

4 Banos’ supplemental declaration is therefore not only improper on reply, it is also  
 5 entirely irrelevant to any issue presented by the pending motion. It should therefore be  
 6 disregarded by the Court.

7 Supplemental Declaration of Gregg Farley:

8 Mr. Farley goes on for several pages discussing the same issues concerning  
 9 Plaintiff’s truthfulness as Mejia does (i.e., his termination for lying about his injury, and  
 10 his improper retention of the duplicate wage payment). Again, because Mejia’s adequacy  
 11 as a class representative is one of the factors considered under Rule 23, and all of the  
 12 evidence included was available prior to Plaintiff filing his motion, there is no excuse for  
 13 belatedly including this information here.

14 Mr. Farley also includes additional deposition excerpts from three depositions that  
 15 were taken weeks or months before the instant motion was filed. The failure to include  
 16 this evidence with the moving papers deprived DHL of the opportunity to address it in its  
 17 Opposition, thereby unfairly prejudicing DHL.<sup>6</sup>

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20 <sup>6</sup> Mr. Farley also asserts in his declaration that DHL failed to properly disclose certain declarants under  
 21 Rule 26. However, as Mr. Farley notes, *most of these witnesses were disclosed*, but he asserts they were  
 22 not identified as having some of the information they included in their declarations. This amounts to  
 23 “splitting hairs,” and Mr. Farley has demonstrated no prejudice to Plaintiff. *See Yeti by Molly Ltd. v.*  
 24 *Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001)(Undisclosed evidence is not excludable “if  
 25 the parties’ failure to disclose the required information is substantially justified or harmless.”). Indeed,  
 26 Plaintiff himself substantially narrowed the class he seeks to certify and has abandoned most of the  
 27 claims he originally pleaded (and he now seeks to file a Second Amended Complaint based on the newly  
 28 configured claims and classes). DHL was informed of this in the Rule 7-3 conference just one week  
 before the instant motion was filed, and had to adjust its arguments and evidence accordingly.  
 Furthermore, the declarations in question were all obtained within less than two weeks prior to filing the  
 Opposition, and thus, *even if the witnesses had never been disclosed before at all*, there would still be no  
 violation of Rule 26. *See Wilson v. Kiewit Pacific Co.*, 2010 WL 5059522, at \*10 (N.D. Cal. Dec. 6,  
 2010) (denying request to exclude undisclosed declarants where the plaintiff moved for certification of  
 different classes than alleged in complaint and the declarations were all obtained between the time the  
 motion and opposition were filed).

1 There is no excuse for Plaintiff's untimely attempt to introduce this evidence, nor  
 2 has Plaintiff even attempted to proffer an explanation. Plaintiff's untimely submissions  
 3 of three new declarations, and the evidence attached thereto, should be struck and  
 4 disregarded in their entirety.

5 **III. THE COURT SHOULD STRIKE NEW ARGUMENTS OFFERED FOR**  
 6 **THE FIRST TIME ON REPLY**

7 In addition to the bar on submitting new evidence on reply, a moving party is not  
 8 permitted to offer new *arguments* in its reply brief. *Graves v. Arpaio*, 623 F.3d 1043,  
 9 1048 (9th Cir. 2010) ("arguments raised for the first time in a reply brief are waived.");  
 10 *see also Koerner v. Grigas*, 328 F.3d 1039, 1048 (9th Cir. 2003) (district court need not  
 11 consider arguments raised for the first time in a reply brief).

12 Here, as discussed above, Plaintiff uses his improperly submitted new evidence to  
 13 make various arguments that could have been raised in his opening brief. Plaintiff should  
 14 not be able to augment his opening brief by setting forth entirely new arguments on reply.  
 15 As Plaintiff failed to timely raise these arguments in his opening brief, Plaintiff has  
 16 waived them and they should be disregarded.

17 **IV. IF THE COURT CONSIDERS THE UNTIMELY EVIDENCE, DHL**  
 18 **SHOULD BE GIVEN AN OPPORTUNITY TO RESPOND IN A SUR-**  
 19 **REPLY**

20 In the alternative, if the Court is inclined to permit this untimely evidence  
 21 submitted in contravention of the Local Rules, DHL must be afforded an opportunity to  
 22 respond. *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) ("the district court  
 23 should not consider the new evidence without giving the [non-]movant an opportunity to  
 24 respond.").

25 DHL's response would address the new evidence and arguments raised by Plaintiff  
 26 for the first time in his Reply, as briefly set forth above. DHL would also like the  
 27 opportunity to address Plaintiff's serious mischaracterization of the leading California  
 28 case regarding rounding of work time, *See's Candy v. Superior Court*, 148 Cal. Rptr. 4th  
 889 (2012). Plaintiff grossly misrepresents this case, asserting that it somehow stands for



1 the proposition that a “grace period” should be equated with “rounding.” In fact, the  
2 *exact opposite* is the case. The court in *See’s Candy* repeatedly distinguished the  
3 defendant’s grace period policy from rounding, and indeed refused to accept the findings  
4 of the plaintiff’s expert because he had simply assumed, without proffering any evidence,  
5 that work was being performed during the grace period, *exactly the way Mejia and his*  
6 *expert do in the present case.* *Id.* at 907-8. Furthermore, the court in *See’s* expressly  
7 disagreed with the plaintiff’s argument that the use of a “grace period” resulted in the  
8 company keeping inaccurate time records. *Id.* at 909. Yet here, Mejia makes this same  
9 meritless argument in his Reply.

10 Ultimately, the key for the court in the *See’s Candy* case, as it should be for the  
11 court here, is that the plaintiff failed to provide any evidence whatsoever that any work  
12 was occurring, or that the employees were under the “control” of the employer during the  
13 “grace period.” *Id.* at 908 (“because Silva presented no evidence to support this  
14 assumption [that grace period time was work time], Dr. Thompson’s calculations were  
15 invalid . . .”); at 909 (“Silva did not produce *any* evidence showing the class members  
16 who clocked in during the grace period were working or were under the employer’s  
17 control”); at 913 (“the grace period policy is not a rounding policy per se; it is a policy  
18 under which an employer seeks to accurately pay employees from the time they begin  
19 and end work”).

20 Plaintiff’s resort to new arguments in his Reply is the result of the fundamental  
21 flaw in his claims: *Mejia has provided no evidence at all that anybody, including*  
22 *himself, was ever due wages for pre-shift time while clocked in during a “grace period.”*  
23 Thus, Plaintiff’s motion fails, and certification should be denied.

24 Due to Plaintiff’s improper inclusion of new evidence and argument in his Reply,  
25 DHL respectfully requests that, if this evidence and argument is not disregarded, DHL be  
26 permitted to file a sur-reply of no more than 10 pages to address Plaintiff’s new evidence  
27 and arguments.  
28

1 **V. CONCLUSION**

2 Defendant respectfully requests that the Court strike Plaintiff's procedurally  
3 defective and untimely supplemental declarations and exhibits thereto in their entirety.  
4 Defendant also respectfully requests that the Court disregard the aforementioned  
5 arguments Plaintiff has raised for the first time on reply. In the alternative, Defendant  
6 requests that the Court permit Defendant to file a sur-reply to address the new arguments  
7 and evidence.

8  
9 DATED: November 4, 2015

Respectfully submitted,

10 SEYFARTH SHAW LLP

11  
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